IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STRUCTURE THE MODE AND ORDER OF PRESENTATION OF THE CASE TO SEPARATE JURY ISSUES FROM EQUITABLE ISSUES [Dkt. No. 2552]

Plaintiffs' response in opposition, Dkt. No. 2600 ("Opposition"), to Defendants' *Motion To Structure The Mode And Order Of Presentation Of The Case To Separate Jury Issues From Equitable Issues*, Dkt. No. 2552 ("Motion"), makes clear Plaintiffs' intention to try their entire case to the jury regardless of the Court's repeated rulings cabining Count 7. More than two years ago, the Court ruled that Plaintiffs cannot apply 27A Okla. Stat. § 2-6-105(A) to conduct occurring beyond the borders of the State of Oklahoma. *See* Aug. 18, 2009 Hearing Tr. at 100:13-101:16, 188:7-11 (Mot. Ex. A & Dkt. No. 2548); June 15, 2007 Hearing Tr. at 16:22-17:14, 44:17-45:7 (Dkt. No. 2057 Ex. 38). Nevertheless, Plaintiffs insist that the Court allow them to show the jury extensive evidence of alleged misconduct by the Defendants and others in Arkansas. The Court has also made clear that questions related to the availability and scope of relief are for the Court, not for the jury. Plaintiffs nevertheless insist on introducing to the jury extensive evidence related to alleged damages and remedial alternatives. Plaintiffs furthermore insist on presenting the jury with their undifferentiated case, including (despite the Court's ruling to the contrary) evidence of use of poultry litter by persons who have no connection to Defendants whatsoever. Allowing Plaintiffs to proceed in this manner will only confuse the jury, result in prejudice to Defendants, and waste the Court's, the parties' and, most importantly, the jurors' time and resources. The more efficient and appropriate approach is to deal with the jury question first, and then resolve the balance of the case as necessary.

INTRODUCTION

As explained in the Motion, the only remaining question for the jury is whether Defendants are liable for one or more violations of 27A Okla. Stat. § 2-6-105(A). *See* Opinion and Order, Dkt. No. 2527 (Aug. 26, 2009) ("Order"). Under that statute the jury must determine whether any Defendant (1) "cause[d] pollution of any waters of the state;" or (2) "place[d] or

cause[d] to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state." 27A Okla. Stat. § 2-6-105(A). Plaintiffs nowhere dispute that Section 2-6-105(A) requires proof of specific violations. *Cf.* Mot. at 3-4. As explained in the Motion, the jury will be asked to assess "each violation," identifying "each day or part of a day upon which" any Defendant did so. The jury must determine the specific number of violations and the dates when each occurred in order to allow the Court to assess the applicable penalties for each. *See id.*; 27A Okla. Stat. § 2-3-504. A finding as to the specific dates on when violations occurred will also be necessary to assess remedies under the correct version of the statute given statutory changes in the availability and amount of civil penalties. *See* Dkt. No. 1930 at 10.

The Court plainly has ample authority to structure trial in the most appropriate manner. Federal Rule of Evidence 42(b) authorizes the Court to proceed first with "clearly separable" issues in order to promote efficiency and avoid prejudice. Federal Rule of Evidence 611 similarly vests the Court with the discretion to structure the presentation of the case so as to promote the efficient and fair conduct of the trial. Where, as here, the jury's task is focused, where substantial evidence has no relevance to the jury question, where its admission would result in confusion and manifest prejudice, and where the issues are clearly separable, the appropriate approach is to parse the questions, proceeding with the jury question first and returning to the balance of the case as necessary. *See Angelo v. Armstrong World Indus.*, 11 F.3d 957, 964 (10th Cir. 1993); *AG Equip. Co. v. AIG Life Ins. Co., Inc.*, 2009 U.S. Dist. LEXIS 6610 (N.D. Okla. Jan. 29, 2009) (same); *see also Vichare v. Ambac Inc.*, 106 F.3d 457, 466 (2d Cir. 1996) (citations omitted).

DISCUSSION

A. Bifurcation Is Appropriate In Order to Avoid Confusion and Prejudice Through The Introduction of Irrelevant Evidence

The only remaining question for the jury is whether Defendants are liable for one or more violations of 27A Okla. Stat. § 2-6-105(A). *See* Order at 1-3. Substantial portions of Plaintiffs' proposed case have no bearing upon that question. Evidence of poultry operations and poultry litter applications in Arkansas, evidence relevant only to injunctive relief, and evidence quantifying the extent of the alleged injury are beyond any question to be put to the jury. Because presentation of such evidence to the jury would confuse the issues, prejudice the jury, and waste time and resources, the Court should proceed with the jury issues first, and then hear any remaining evidence separately.

1. Evidence of Poultry Operations and Poultry Litter Applications in Arkansas

More than two years ago, in June 2007, the Court ruled that Plaintiffs cannot apply Section 2-6-105 to conduct occurring in Arkansas. *See* June 15, 2007 Hearing Tr. at 16:22-17:14, 44:17-45:7 (Dkt. No. 2057 Ex. 38).[1] Plaintiffs acknowledge that Arkansas-based conduct cannot serve as a basis for liability under 27A Okla. Stat. § 2-6-105. *See* Opp. at 1. Nevertheless, Plaintiffs demand that they be allowed to present extensive evidence on this topic to the jury. Plaintiffs' principal justification for this extraordinary request is that potential runoff from poultry litter in Oklahoma is subject to the same basic physical principles as potential runoff in Arkansas. *See* Opp. at 11. But Plaintiffs nowhere explain why scientific testimony

[1] The Court has held repeatedly that Oklahoma statutory and common law may not extend beyond the political boundaries of the State. *See* Aug. 18, 2009 Hearing Tr. at 100:13-101:16, 188:7-11 (Mot. Ex. A & Dkt. No. 2548); June 15, 2007 Hearing Tr. at 16:22-17:14, 44:17-45:7 (Dkt. No. 2057 Ex. 38); Dkt. No. 1187; Dkt. No. 1202; *see also* Dkt. No. 2166 at 13 (conceding that "[i]n light of this Court's June 15, 2007 ruling, the State is not seeking to apply its claim under 27A Okla. Stat. § 2-6-105 (Count 7) to conduct outside the State of Oklahoma").

such as, for example, the amount of phosphorous that may leach from a ton of poultry litter, requires geopolitical context. Moreover, the fact that the laws of gravity and physics apply equally in both states, *id.*, is no justification for the introduction of evidence of poultry operations in Arkansas that is irrelevant to the only issue for the jury—whether specific Defendants committed specific violations of Oklahoma law in Oklahoma.

Having acknowledged that Section 2-6-105(A) does not reach conduct in Arkansas, Plaintiffs nevertheless assert that evidence of conduct in Arkansas is "relevant to evaluating water conditions and pollution in the Oklahoma portion or the IRW." Opp. at 12. But in so arguing, Plaintiffs seek to do precisely what they have admitted is improper and what the Court has repeatedly prohibited them from doing—punish Defendants under Oklahoma statutory law for conduct in Arkansas. Plaintiffs may attempt to make that showing to the Court under their federal law claims, but not under state law, and certainly not as part of their Count 7 claim before the jury. And, in any event, Plaintiffs are wrong. Liability under 27A Okla. Stat. § 2-6-105(A) does not turn on aggregate conduct, but rather must be premised upon proof that a specific actor on a specific day engaged in conduct that itself resulted in or risked pollution. *See supra* at 2.

Exposing the jury to evidence of poultry operations and poultry litter applications in Arkansas and the regulatory program governing that conduct in Arkansas will only result in confusion and prejudice. While Plaintiffs suggest that only a "minor portion" of their evidence is not relevant to Count 7, *see* Opp. at 10, the truth is that Plaintiffs' undifferentiated case includes a substantial amount of Arkansas-based evidence. Indeed, 53 percent of farm acreage in the IRW is located in Arkansas. *See* Clay Report at 9 (Ex. 1). Similarly, approximately two-thirds of the poultry farming operations that Plaintiffs' case would target are located in Arkansas. *See id*. at App. A, Table A-A (Ex. 1). Unless directed otherwise, Plaintiffs' experts will likely rely

on undifferentiated watershed-wide estimates of poultry litter,[2] poultry counts, and other similar metrics. Yet the jury will be charged only with assessing whether specific applications by specific Oklahoma poultry operations caused injury in Oklahoma. Adopting Plaintiffs' proposed approach would require the jury impossibly to sift evidence of poultry operations in Oklahoma from poultry operations IRW-wide. The jury will similarly be asked to parse irrelevant evidence regarding the poultry litter regulatory programs in Arkansas from the highly relevant evidence regarding the specific regulatory programs that Oklahoma has put in place to prevent the very conduct that Plaintiffs allege in Count 7—pollution of waters of the State of Oklahoma by the land application of poultry litter in Oklahoma. These are not the sort of narrow and discrete issues that are appropriate for a limiting instruction. *Cf.* Opp. at 9. Even the most objective and impartial of jurors would be hard-pressed to listen to evidence regarding farms in Oklahoma and Arkansas, observe growers and regulators from both States testify, listen to Plaintiffs' experts testify about the total amount of litter produced and applied in both States and then separate out those facts that are relevant to potential liability under 27A Okla. Stat. § 2-6-105(A) from those facts that are not relevant. Ultimately, the only purpose served by such evidence would be to invite the jury to improperly hold Defendants accountable under Oklahoma statutory law for the application of poultry litter in Arkansas.

2. Evidence Relevant to Equitable Relief and Remediation

Equally irrelevant to any jury question is evidence bearing on the potential costs of

[2] As has been their recent practice, Plaintiffs once again promise a motion to reconsider, directed this time at the Court's ruling that Plaintiffs cannot seek to punish Defendants for the conduct of individuals who have no contractual or other relationship with Defendants. *See* Opp. at 6 n.3. The Court correctly determined that Restatement § 427B plainly has no application to non-Growers who purchase litter on the open market and use it completely free of any contact with any Defendant. Nevertheless, Plaintiffs insist on being able to present to the jury undifferentiated testimony regarding poultry litter with no acknowledgement of these non-parties. *See* Opp. at 6-9. That would be grossly improper.

remediation. *See* Mot. at 14-15. Plaintiffs assert generally that their remedial evidence is relevant to liability issues, dismissing Defendants' argument as "broad and unsupported." *See* Opp. at 8. But, Plaintiffs make no effort to explain precisely how, for example, Todd King's opinion that Defendants should pay more than $1 billion to replace entire waste water treatment plants is relevant to any permutation of liability under 27A Okla. Stat. § 2-6-105(A), the only issue before the jury. *See* King Report at App. 1, pp. 1-12 (May 15, 2008) ("Summary of Costs for Remedial Alternatives") (Mot. Ex. B); *see also* Aug. 13, 2009 Hearing Tr. at 96:6-99:13 (Mot. Ex. C & Dkt. No. 2533) (discussing King testimony).

In addition to Mr. King, Plaintiffs' recently-submitted priority witness list includes a number of other individuals whose testimony, to the extent it is relevant and appropriate at all,[3] goes only to relief. For example, Plaintiffs have listed various members of their contingent valuation team from Stratus Consulting: Richard Bishop, David Chapman, Michael Hanemann, Barbara Kannienen, Jon Krosnick, and Roger Tourangeau. Plaintiffs make no showing of what relevance the Stratus public opinion survey has to do with whether any Defendant (1) "cause[d] pollution of any waters of the state;" or (2) "place[d] or cause[d] to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state." 27A Okla. Stat. § 2-6-105(A). Plaintiffs have also listed David Payne, another damages expert, as a priority witness. At the pre-trial hearing, Plaintiffs admitted that his testimony was relevant at most *only* to penalties, specifically to the factors listed for consideration by the Court in 27A Okla. Stat. § 2-3-504(H). *See* Sept. 3, 2009 Hearing Tr. at 116:8-117:11 (Payne's testimony is at most "a judge only issue") (Dkt. No. 2602). Nothing that any of these witnesses has to say is, as

[3] Defendants dispute the relevance of any of these witnesses to any issue in this case, and, in the event they are called to testify, the Court will first have to resolve Defendants' *Daubert* motions as to their testimony.

Plaintiffs claim, "the same as or intertwined with the evidence that will be presented to the jury to prove" liability. Opp. at 14.

Rather, damages and remediation evidence is irrelevant to any liability question to be put to the jury. Moreover, the admission of such testimony could only serve to inflame and prejudice the jury, inviting them to render a verdict against Defendants based not on any evidence of actual misconduct, but rather based on Plaintiffs' experts' assessment of the potential costs of remediation. The appropriate course is to handle the jury liability issues first.

3. Other Evidence Not Relevant to Liability under Count 7

Finally, as noted in Defendants' Motion, various other portions of Plaintiffs' proposed evidence are not relevant to the narrow questions presented for the jury by Count 7. *See* Mot. at 7-9. In response, Plaintiffs argue that all of this evidence is relevant to whether "pollution" occurred as that term is defined in 27A Okla. Stat. § 1-1-102(12). *See* Opp. at 13-14. But Plaintiffs prove too much. As explained in the Motion, *the fact* of whether or not an injury occurred or was likely to have occurred is a jury question, but the *degree* of injury is relevant only to the remedial questions reserved for the Court. *See* Mot. at 7-9. Hence, for example, while the question whether phosphates in poultry litter have caused or are likely to cause "pollution" of waters in the Oklahoma portion of the IRW is relevant to liability, the degree to which the IRW has changed over the past fifty years is relevant at most, if at all, only to remedial considerations. Indeed, much of Plaintiffs' anticipated parade of horribles is irrelevant.

Similarly, as the Court knows, Plaintiffs hope to introduce extensive evidence of Defendants' alleged knowledge of risks associated with poultry litter. While some such evidence

arguably may be relevant to the Court's remedial inquiry under 27A Okla. Stat. § 2-3-504,[4] such knowledge evidence is irrelevant to determining whether or not any Defendant (1) "cause[d] pollution of any waters of the state;" or (2) "place[d] or cause[d] to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state." 27A Okla. Stat. § 2-6-105(A). Thus, various discrete aspects of Plaintiffs' proofs are not relevant to the sole remaining jury question. The Court and parties can identify precisely which ones as the jury trial proceeds.

B. Proceeding With Count 7 First Will Promote Efficiency, Conserve Resources, and Avoid Unnecessarily Burdening the Jury

As discussed in the Motion, proceeding first with the Count 7 jury question will result in substantial economies. Plaintiffs do not dispute that jury proceedings take substantially longer than bench hearings. *See* Mot. at 10. A bench trial not only streamlines the evidentiary formalities required for a jury, but also affords the Court greater leeway to move the presentation along and to limit cumulative presentations. This will conserve the Court's and the parties' time and resources. Defendants' Motion also noted the substantial burden that can be lifted from the jurors. Under the best of circumstances, jury service can be taxing, but, as was reported recently, in these times of economic uncertainty jury duty for many represents a special sacrifice and hardship. *See* John Schwartz, *Call to Jury Duty Strikes Fear of Financial Ruin*, NEW YORK TIMES (Sept. 1, 2009). Yet Plaintiffs ignore entirely the burden on the jurors, and propose instead that they sit needlessly through the entirety of a two-month trial, hearing reams of

[4] "In determining the amount of a civil penalty *the court shall consider* such factors as the nature, circumstances and gravity of the violation or violations, the economic benefit, if any, resulting to the defendant from the violation, the history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the defendant, the defendant's degree of culpability, and such other matters as justice may require." 27A Okla. Stat. § 2-3-504(H) (emphasis added).

evidence that is completely unrelated to the issues that will be presented to them, merely to render a verdict as to liability under a single, narrow claim. That would be unnecessarily burdensome for all involved.

Plaintiffs offer a handful of justifications for opposing the Motion, none of which should prevail. First, they argue that proceeding as Defendants propose would require repetitive presentations of evidence. *See* Opp. at 10, 15. But Plaintiffs give no specific example of this and with good reason, as there would be no need for repetitive evidence. At the close of the jury portion of the trial there would be no need to empanel another jury. Rather, the remaining non-jury issues will all fall to the Court, which will already have heard all of the same evidence presented to the jury. Therefore, the parties will need only supplement their presentations, not repeat them.

Second, Plaintiffs argue that proceeding with Count 7 first may require some witnesses to testify more than once. *See* Opp. at 10, 15. Defendants acknowledged forthrightly in their Motion that this may be necessary for a handful of witnesses. *See* Mot. at 10-11. Yet, while asserting that this will result, Plaintiffs do not identify a single Plaintiffs' witness who will have to testify more than once. Again, this is with good reason, as the majority of Plaintiffs' stable of expert witnesses have discrete areas of responsibility, and few straddle both liability and remediation issues. Most importantly, Plaintiffs do not identify a single factual, non-expert witness who will be burdened by having to testify more than once. To the extent that some of Plaintiffs' (or Defendants') experts must testify more than once, that is a small price to pay to avoid the obvious prejudice and waste of juror, Court and party resources that will result from proceeding otherwise.

Finally, Plaintiffs argue that starting with 27A Okla. Stat. § 2-6-105(A) will "fracture"

their case and result in a "disjointed, repetitive presentation." Opp. at 10, 15. Again, Plaintiffs do not explain why this would be so and fail to offer examples of any area of proof that will be fractured or disjointed. Assuming that Plaintiffs properly developed their case and were prepared to present evidence to support their Oklahoma state statutory claims under Count 7 before the Court's rulings as to Rule 19 and Plaintiffs' jury demand, there should be no reason why their presentation of that evidence should be in any way "disjointed" or "fractured."

To the extent that Plaintiffs are concerned with their ability to demonstrate Oklahoma-specific liability without relying on irrelevant evidence pertaining to Arkansas or other evidence that is irrelevant to the narrow jury question presented under Count 7, any prejudice to Plaintiffs results solely from their own methods and decisions. Plaintiffs elected to plead Count 7, and have been on notice for more than two years that Count 7 has no extra-territorial application. *See supra* at 3 n.1. During that period, Defendants developed Oklahoma-specific evidence to defend against Plaintiffs' state law statutory and common law claims and stand ready to present it. Plaintiffs bore the burden to prepare similarly to prosecute each claim they elected to press. Any failure to do so does not justify compensating for the lack of Oklahoma-specific proof with irrelevant evidence.

CONCLUSION

For the foregoing reasons, the Court should exercise its discretion to structure the trial so as to begin with the jury question under Count 7.

Respectfully submitted,

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